Ontario

BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint of Analiza Deleon, dated October 22, 1999 and amended May 9, 2000, alleging discrimination in employment contrary to sections 5(1), 7(2), 7(3), and 9 of the *Code*;

AND IN THE MATTERS OF the complaints of Dao T. Bui, dated January 30, 2000 and amended May 9, 2000; Cherry Kusi, dated January 30, 2000 and amended May 11, 2000; Lynn McWhirter, dated February 4, 2000 and amended June 9, 2000; Lydia Neves, dated December 1, 1999 and amended May 8, 2000; Patricia O'Brien, dated January 30, 2000 and amended May 8, 2000; and, Noralyn Ogalino, dated January 31, 2000 and amended May 9, 2000; all alleging discrimination in employment contrary to sections 5(1), 7(2), 7(3), 8, and 9 of the *Code*.

B E T W E E N:

Ontario Human Rights Commission

-and-

Dao T. Bui, Analiza Deleon, Cherry Kusi, Lynn McWhirter, Lydia Neves, Patricia O'Brien, Noralyn Ogalino

Complainants

-and-

B & G Foods Inc., 1060283 Ontario Limited, 1060284 Ontario Limited, 870359 Ontario Limited, 1124600 Ontario Limited, 1051044 Ontario Limited, 1119624 Ontario Limited, 1124661 Ontario Limited, Brigitte Foods Inc., Greg Kirkoryan, Brigitte Regenscheit, Alvin Adoptante

Respondents

INTERIM DECISION

Adjudicator: Steven Faughnan

Date: Nov 7, 2001

Board File No.: BI-400-00 to BI-0406-00

Decision No.: 01-025-I

APPEARANCES

Ontario Human Rights Commission	)	P.Rajan, Counsel
Dao T. Bui, Analiza Deleon, Cherry Kusi, Lydia Neves, Patricia O'Brien, Noralyn Ogalino, *Complainants*	)	J. Rubin, Counsel
B & G Foods Inc., 1060283 Ontario Limited, 1060284 Ontario Limited, 870359 Ontario Limited, 1124600 Ontario Limited, 1051044 Ontario Limited, 1119624 Ontario Limited, 1124661 Ontario Limited, Brigitte Foods Inc., *Corporate Respondents*	)	J. Levitan, Counsel B. Schiller, Counsel
Greg Kirkoryan, Brigitte Regenscheit, Alvin Adoptante, *Personal Respondents*	)	

INTRODUCTION

These are the Board's reasons for decision on a motion brought by B & G Foods Inc. ("B & G"), 1060283 Ontario limited, 1060284 Ontario Limited, 870359 Ontario Limited, 1124600 Ontario Limited, 1051044 Ontario Limited, 1119624 Ontario Limited, 1124661 Ontario Limited, Brigitte Foods Inc. (the "Corporate Respondents"), Greg Kirkoryan ("Kirkoryan"), Brigitte Regenscheit ("Regenscheit") and Alvin Adoptante ("Adoptante") (collectively referred to as the "Respondents"), seeking an order dismissing or staying the complaints (the "Complaints") of Dao T. Bui, Analiza Deleon, Cherry Kusi, Lynn McWhirter, Lydia Neves, Patricia O'Brien and Noralyn Ogalino (the "Complainants"). In the alternative, the Respondents seek an order removing certain Corporate Respondents as parties to the proceeding.

Preliminary Matters

At the outset of the motion the Respondents advised the Board that they would be withdrawing their motion to strike certain paragraphs relating to the remedial relief sought in the Commission's Statement of Facts and Issues. The Board proceeded to hear the balance of the motion.

Although the Respondents initially sought to rely on the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11* (the "*Charter*") and jurisprudence that interpreted the rights set out in the *Charter* as interpretive tools, as the motion progressed the Respondents advised that they would simply rely on administrative law principles in support of their motion for a dismissal or stay. Should the Respondents wish to renew their motion on the basis of the applicable sections of the *Charter* they remain free to do so after giving the appropriate notice.

The Respondents also sought in error to rely on section 4.6(1) of the *Statutory Powers Procedure Act, R.S.O. 1990, c. S. 22, as amended*, (the "*SPPA*") as foundation for its motion. Section 4.6(1) can only be relied on to dismiss a proceeding if, in accordance with section 4.6(6) of

the *SPPA*, the Board has made rules under section 25.1 of the *SPPA* respecting the early dismissal of proceedings, which rules shall include the items found at subparagraphs (a) to (c) of section 4.6(6) of the *SPPA*. The Board has not made such rules. Contrary to the suggestions of the Respondents, the rulings made during these proceedings do not qualify as "rules" under section 4.6(6) of the *SPPA*.

Finally, the Complainants represented by Ms Rubin adopted the Commission's submissions on the motion. Lynn McWhirter, who did not appear on the motion, was content to rely on the Commission's submissions. As a result, where the Board sets out the parties' submissions, the submissions made on behalf of the Complainants are not set out separately.

ISSUES

The following issues were before the Board of Inquiry (the "Board"):

(1) Has the Commission failed to meet the statutory requirements under section 33(1) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*") to endeavour to effect a settlement of the Complaints, or failed to properly consider the matters set out in section 34 of the *Code*, thereby failing to meet a condition precedent to a valid referral to the Board pursuant to section 36(1) of the *Code*? Does the Board lack jurisdiction to proceed to hear these Complaints because of any failure of the Commission to fulfill such a statutory pre-condition?

(2) Can the Respondents invoke the doctrine of *Res Judicata*?

(3) Would it be an abuse of process for the Board to hear the Complaints and should the Complaints be stayed or dismissed because of the following circumstances, which took place before the subject-matter of these Complaints was referred to the Board:

   a. The delay by certain Complainants in filing their Complaints;

   b. An alleged failure by the Commission to endeavour to effect a settlement of the Complaints;

c. The existence of a settlement of six of the seven complaints brought by the Complainants against TDL Group Ltd. ("TDL"), the franchisor of the Respondents' Tim Horton's franchises;

d. The conduct of the Commission and Complainants, which the Respondents allege is evidence of bad faith and gives rise to a reasonable apprehension of bias against the Respondents.

(4) Should the Board remove certain Corporate Respondents from the proceedings?

DECISION

The motion is dismissed.

BACKGROUND

This proceeding involves various Complaints alleging that the Respondents breached the provisions of the *Code* on a number of grounds. The Personal Respondents Kirkoryan and Regenscheit are officers, directors and shareholders of the Corporate Respondents. Adoptante is an employee of the Corporate Respondents. The Complaints allege that the Complainants were subjected to sexual solicitation or advance, reprisal or a threat of reprisal for rejection of sexual solicitation or advance, sexual harassment and discrimination in employment on the basis of sex and, with the exception of the Complaint of Analiza Deleon ("Deleon"), reprisal for claiming and enforcing their rights under the *Code* and participating in proceedings under the *Code*. In addition, Cherry Kusi ("Kusi") also alleges discrimination in employment on the basis of creed.

The Respondents acknowledge that the grounds for the motion arise from the acts and decisions of the Commission and the Complainants leading up to the Complaints being referred to the Board under section 36(1) of the *Code*.

FACTS

On September 18, 1998, TDL, the franchisor of the Respondents' Tim Horton's franchises, allegedly became aware, through an anonymous complaint letter, of allegations of sexual harassment by Kirkoryan directed at employees of B & G. Counsel was retained by TDL to investigate the allegations. The investigator issued a reporting letter dated November 26, 1998, concluding that she was unable to complete the investigation for a number of reasons including an allegation that B & G and its principals refused to provide the cooperation required for an effective investigation.

By letter dated July 13, 1999, TDL allegedly received formal notification of allegations of sexual activity and reprisal activity involving Regenscheit, Kirkoryan and Adoptante. Once again, TDL retained an investigator to inquire into these complaints.

The Complainants filed Complaints against B & G, Regenscheit, Kirkoryan and Adoptante with the Commission between October 22, 1999 and February 4, 2000.

The Respondents included at Exhibit "ww" to Regenscheit's Affidavit, a copy of a draft Complaint signed by Lydia Neves ("Neves") dated October 30, 1999. The complaint has the words "TDL Group Ltd." handwritten in as a respondent. There was no evidence led that this complaint was ever served. In the complaint filed by Neves on December 1, 1999, and in her amended complaint dated May 8, 2000, TDL is not listed as a respondent.

The Complainants filed their complaints against TDL (the "TDL Complaints") between January 30, 2000, and February 4, 2000. These complaints alleged that TDL was in breach of section 5(1) and 9 of the *Code* because TDL had reason to know that Kirkoryan was sexually harassing female employees, but failed to conduct an investigation or make inquires of Kirkoryan or Regenscheit regarding a sexual harassment complaint made to TDL against Kirkoryan, thereby failing to prevent subsequent harassment of the Complainants.

By letter dated March 16, 2000, the Respondents asked the Commission not to deal with the complaints pursuant to sections 34(1)(b) and 34(1)(d) of the *Code*. In support of this request the Respondents challenged the timeliness of the Deleon, Kusi, Patricia O'Brien (O'Brien"), Noralyn Ogalino ("Ogalino") and Lynn McWhirter ("McWhirter") complaints, alleging that the last incidents of alleged harassment set out in these complaints occurred more than six months before the complaints were filed. The Respondents maintained the challenge to the timeliness of those complaints before the Board.

Between May 8, 2000 and June 9, 2000 the Complainants amended their complaints to add some additional wording and other Respondents. The Complaints detail specific behaviour and conduct related to specific allegations of acts or omissions involving Regenscheit, Kirkoryan and Adoptante that are alleged to be a direct or indirect infringement of sections 5(1), 7(2), 7(3)(a), 7(3)(b), 8 and 9 of the *Code*. TDL was not added as a Respondent to the Complaints.

In or about June 2000, Bui, Deleon, Kusi, Neves, O'Brien and Ogalino settled their complaints against TDL. McWhirter was not a signatory to the release nor was she a party to the settlement. Consequently, the TDL Complaints were not referred to the Board. There was no evidence on the record that, prior to the settlement of the TDL Complaints, the Respondents were aware that any complaints had been filed against TDL. Obviously, the Respondents were not parties to any settlement or resolution of the TDL Complaints.

By letters dated August 31, 2000, the Commission denied the Respondents' section 34 request. On October 3, 2000, the Respondents filed an Application for Judicial Review challenging the Commission's refusal to exercise its discretion under section 34 of the *Code* to dismiss the Complaints. The grounds of the Application, to which was added an additional ground on February 1, 2001, are virtually identical to the grounds the Respondents argued before the Board on this motion.

Attached as exhibits to the affidavits filed by the Commission and the Respondents on the motion are a series of letters exchanged between Mr. Levitan, the solicitor for the Respondents and Ms Crowe, Investigation Officer for the Commission. Although there was no examination of the drafters of the letters, the substance of these letters became an issue on the motion. The Commission asserts that these letters confirm that it endeavoured to effect a settlement of the Complaints before referral to the Board of Inquiry, thereby satisfying the requirements of section 33(1) of the *Code*. The Respondents disagree. They submit that the letters demonstrate the Respondents' frustration with the Commission, the Commission's bad faith in dealing with them as Respondents and support the Respondent's assertion that the Commission did not endeavour to effect a settlement, rather that the Commission was participating in an effort to circumvent the *Code*.

The Respondents' submissions on the section 36 case analysis set out in a letter to the Commission dated December 22, 2000, allege, among other things, that conciliation was not attempted and that the releases signed by the Complainants, with the exception of McWhirter, released the Complaints against the Respondents.

As confirmed in a letter dated January 18, 2001, the Commission advised the Respondents that it had decided to refer the Complaints to the Board and that they would be combined for hearing pursuant to section 32(3) of the *Code*.

On February 1, 2001, the Respondents provided the Commission with an Amended Amended Notice of Application for Judicial Review, which, although Boards are no longer appointed, now asked for an interim order staying the OHRC investigation "...including the appointment of a Board of Inquiry", and adding bad faith by the Complainants, with the exception of McWhirter, to continue with their complaints against the Respondents in light of the releases with TDL as a ground for review.

In support of their submissions that they suffered prejudice as a result of the conduct of the Commission and the Complainants, the Respondents rely on the affidavit of Regenscheit, filed on the

motion.

Reviewing the Actions or Conduct of the Commission Prior to Referral

The Parties' Submissions

The Respondents urge the Board to review and consider the conduct of the Commission in this case. The Commission submits that the Board should not consider the Commission's conduct in this case unless such conduct results in an abuse of the Board's process.

Analysis

The Board has no supervisory jurisdiction over the Commission, and unless there has been an abuse of the Board's process, the Board's role does not include a review of the actions or conduct of the Commission or its handling of a case leading up to a referral to the Board. The Board's task is not to determine whether the Commission has exceeded or failed to exercise its jurisdiction by acting unfairly or failing to satisfy a statutory prerequisite or pre-condition. That is the job of the Divisional Court on judicial review. This statement of principle, which the Board adopts in this case, has previously been accepted in a number of cases before the Board. (See *Anonuevo v. General Motors of Canada Ltd.*, [1998] O.H.R.B.I.D. No. 7 at paragraph 91 and *Jeffrey v. Dofasco*, [2000] O.H.R.B.I.D. No. 11 at paragraph 9 and the authorities mentioned therein. It is implicit in adopting this approach that this panel of the Board prefers the reasoning of Member Abramsky in *Joe v. University of Toronto (No.1)*, (1995) 25 C.H.R.R. D/472 (Ont. Bd. Inq.) at pages D/477 to D/478 and is not following the majority decision in *Findlay v. Mike's Smoke and Gifts (No.4),* (1993) 21 C.H.R.R. D/19 (Ont. Bd. Inq.))

The Divisional Court confirms this analysis in *Payne v Ontario (Board of Inquiry, Human Rights Code)* [2000] O.J. No. 1896 (Q.L.), when it states at paragraph 5 of that decision:

The Board does not have jurisdiction to overrule or exercise appellate or review

judgment as to what the Commission decided to do under section 36 and 37 of the Code.

As the Ontario Court of Appeal has stated, once a complaint has been referred to the Board of Inquiry, there is no provision in the *Code* that limits the Board of Inquiry's obligation to conduct a hearing into a complaint. (See *McKenzie Forest Products Inc. v. Ontario (Human Rights Commission) et al.* [2000] O.J. No. 1318 (Q.L.), at paragraph 41)

While it is not for the Board to determine if the jurisdictional prerequisites or pre-conditions to referral have been satisfied, or to say if the Commission exceeded its jurisdiction or failed to satisfy a statutory prerequisite or pre-condition, the Board remains in control of its own process and may be required to consider and assess what lasting impact matters that occurred prior to the referral have had on the fairness of the proceeding before it and whether continuing with the proceeding would be an abuse of the Board's process. (See *Jeffrey v. Dofasco*, supra; *Anonuevo v. General Motors of Canada Ltd.*, supra)

Reviewing the Commission's Process under Section 34 of the Code

Parties' Submissions

The Respondents argue that the period of time under section 34(1)(d) of the *Code* is akin to a limitation period and that the Commission failed to properly consider this and other requirements of section 34(1)(d) before the Complaints were referred to the Board. The Respondents do not argue that the Commission did not receive and review its submissions on section 34 of the *Code* or the section 36 case analysis. The Respondents, however, object to the Commission dealing with the Complaints in the face of the delay of some of the Complainants in the filing of their Complaints. This delay, the Respondents allege, was not incurred in good faith and resulted in substantial prejudice to them.

With respect to the signing of the release of the TDL Complaints, the Respondents relied on

the Commission's own policy and practice statements to support its allegations that the Commission and the Complainants, except McWhirter, acted in bad faith in proceeding with the Complaints, in the face of the settlement of the TDL Complaints. Amongst other things, the Respondents rely on statements in the Commission's "Guide to Mediation Services", dated May 14, 1997, which indicates that if the complaint is resolved, all issues that are related to or arising from the complaints are "closed". In addition, they rely on the Commission's "Enforcement Procedures Manual", dated April 1997, which indicates that, absent evidence of duress, proceeding with a complaint in the face of a signed release will virtually always be evidence of bad faith and is the foundation for a refusal to deal with a complaint under section 34(1)(b) of the *Code*.

The Commission submits that all the statutory requirements were satisfied and further submitted that the Board has no power to review the exercise of the Commission's discretion under section 34 of the *Code*, unless the conduct of the Commission results in an abuse of the Board's process.

Analysis

As stated above, unless it is an abuse of the Board's process, it is not for the Board to say if the Commission exceeded its jurisdiction or failed to satisfy a statutory prerequisite or pre-condition. Whether an alleged failure of the Commission to satisfy a statutory prerequisite or pre-condition is an abuse of process in this case is dealt with below.

While it is therefore unnecessary to explore this issue further, it should be noted that the Respondents did not sign, nor were they parties to the TDL release. This alone distinguishes this case from some of the authorities relied on by the Respondents, in which parties to a settlement or release sought to rely on its existence.

Furthermore, in *Pritchard v Ontario (Human Rights Commission)* [1999] O.J. No. 2061, the Divisional Court overturned a reconsideration decision made by the Commission that applies the

exact wording of the Commission's "Enforcement Procedures Manual" that the Respondents seek to rely on. At page 6 of the decision, the Divisional Court wrote the following:

> To take the approach that there is bad faith whenever a human rights complaint is brought after signing a release risks ignoring the context within which a particular complainant has signed the release and denying access to the investigative procedure under the Human Rights Code without assessing the complainant's individual moral blameworthiness in pursuing the complaint.

Accordingly, it would appear that based on *Pritchard*, the signing of a release without more, does not *automatically* result in a determination by the Commission under subparagraph 34(1)(b) of the *Code* that the subject-matter of the complaint is trivial, vexatious or made in bad faith.

Finally, with respect to the Respondents' submissions on section 34(1)(d) of the *Code*, the Respondents are essentially suggesting that the Commission cannot deal with a complaint based on facts which occurred more than 6 months after the complaint was filed, unless the Commission satisfies itself that the delay was incurred in good faith and there is no prejudice to any person affected. While again not essential for the resolution of this issue on the motion, this does not appear to be borne out by a plain reading of the words of the section. The presence of the words "the Commission may, in its discretion, decide to not deal with the complaint" at the end of the section indicate that even if the requirements of section 34(1)(d) are not met, whether or not the Commission deals with a complaint appears to fall squarely within the Commission's discretion, the exercise of which is a matter that may be reviewed by the Divisional Court. That being said, the Board remains vested with the power to prevent or remedy an abuse of its process as a result of the Commission's conduct.

The failure to endeavour to effect a settlement of the Complaints

Parties' Submissions

The Respondents rely on *Findlay v. Mike's Smoke and Gifts (No.4),* (1993) 21 C.H.R.R. D/19 (Ont. Bd. Inq.), and submitted that the Commission failed to endeavour to effect a settlement in this case thereby failing to satisfy a statutory prerequisite to a referral of the Complaints to the Board. The Respondents submit that the Commission put itself in a position to ensure that section 33(1) of the *Code* could not be complied with and that the steps taken by the Commission with respect to settlement were "phony". The Respondents submit that a statement made in a letter from the Commission dated December 5, 2000, (a letter that was not introduced on the motion) that the parties were unable to resolve the Complaints was a contrived statement to help satisfy the requirements of section 36(1) of the *Code*.

The Commission submits that the Board should not review the conduct of the Commission leading up to a referral under section 36(1) of the *Code*, but in any event, as evidenced by the exchange and content of the correspondence between Mr. Levitan and Ms Crowe, the efforts of the Commission in this case satisfied the requirements of section 33(1) of the *Code*. The Commission urged the Board to follow the approach taken in *Naraine v. Ford Motor Co. of Canada (No. 1)* (1994), 24 C.H.R.R. D/457 (Ont. Bd. Inq.). In that decision, the Board adopted a low threshold for the efforts required to satisfy section 33(1) of the *Code* and refused to find that less-than-thorough settlement efforts were fatal to the Board's jurisdiction.

Analysis

Section 33(1) of the *Code* provides that subject to section 34 of the *Code*, the Commission shall investigate a complaint and endeavour to effect a settlement. Section 36(1) of the *Code* provides that where the Commission does not effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the

Commission may refer the subject-matter of the complaint to the Board.

As stated above, unless it is an abuse of the Board's process, it is not for the Board to say if the Commission exceeded its jurisdiction or failed to satisfy a statutory prerequisite or pre-condition. That is the job of the Divisional Court on a judicial review application.

While it is therefore unnecessary to explore the issue further, it should be noted that there was no evidence on the record to suggest that efforts to endeavour to effect a settlement were not made in this case. When distilled to its essence, the Respondents' criticism is with the manner and sufficiency of the efforts not that none were made. If it is necessary to do so, this is sufficient to distinguish this case from *Findlay*, where, on the record, an admission was made that no settlement efforts were undertaken. Where the evidence demonstrates some effort it is not necessary to examine the manner and sufficiency of the effort. (See in this regard the discussion in *Naraine v Ford Motor Co. of Canada (No. 1)*, supra at D/459; application for judicial review quashed *Ford Motor Co. of Canada v. Ontario (Human Rights Comm.) (1995)*, 24 C.H.R.R. D/464 (Ont. Ct. (Gen. Div.))

This is a sensible approach when one examines the scope of the applicable sections of the *Code*. Neither sections 33(1) nor 36(1) of the *Code* defines the manner or the type of efforts that the Commission must attempt to endeavour to effect a settlement. Mediation or conciliation can often take many forms. It need not be a face-to-face settlement meeting, a structured discussion, any specific manner of communication or a formal process. By its nature a mediation or conciliation must be flexible to achieve its laudatory goals. Although the Respondents are correct when they quote the statements made at paragraph 46 of *Findlay,* that the onus is on the Commission to endeavour to settle the complaint and there is no corresponding onus on the Respondents, the *Code* does not require that settlement attempts be exhausted, although that is a laudable course, only that settlement shall be endeavoured, that some effort be made.

If a Board is required to consider the sufficiency of the Commission's attempts to endeavour to effect a settlement, in order to determine the issue a Board may of necessity have to inquire into

the specifics of the settlement activities. This would lead to evidence on who made any offers, what the offers were, how the offers were responded to, which party if any, was reluctant to settle, and so on. By the Board inquiring into the myriad of factors that surround settlement discussions, and no doubt becoming privy to privileged matters, the without prejudice intention of these types of discussions is removed. By hearing and reviewing the settlement efforts, a panel assigned to hear the case could be disqualified at the outset and another panel would of necessity have to be assigned. In that regard I am mindful of the admonition given by the Divisional Court in *Ford Motor Co. of Canada v. Ontario (Human Rights Comm.),* supra at page D/465 where the Court stated:

> It is not for this Court to attempt to set a standard for the amount of effort of conciliation or settlement as a general rule.

The Application of the Doctrine of Res Judicata

Parties' Submissions

The Respondents submit that the issues are the same in the Complaints before the Board and the TDL Complaints. The Respondents submit that they are based on the same "factual underpinning" and as stated at paragraph 21 of their revised factum, the same legal theory. Consequently, the Respondents submit that because the issues are the same, the resolution of the TDL Complaints should bring the Complaints to an end. In support of these submissions, the Respondents rely on the principles of *Res Judicata.*

The Commission disputes the assertion that a judicial decision had taken place or that the other requirements of *Res Judicata* had been met.

Analysis

Res Judicata, which includes the concepts of cause of action estoppel and issue estoppel, is a rule of evidence. Essentially, the party against whom the suit or issue was decided is estopped from

proffering evidence to contradict that result. It has, in certain circumstances, also been used as the foundation for an abuse of process claim. (*Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2nd ed.(Canada: Butterworths, 1999* at paragraphs 19.51 and 19.94). *Res Judicata* applies not just to judicial decisions, but to administrative tribunals as well, although the tribunal should be one that holds a hearing. Otherwise there is no adjudication. (*See Sopinka, Lederman and Bryant,* supra at paragraph 19.54).

In *Re Bouten* [1982] A.J. No. 733 (Alb. Q.B.), the Court quotes with approval from *G. Spencer Bower and A. Turner, The Doctrine of Res Judicata*, 2nd ed. (London: Butterworths, 1969), setting out that the burden is on the party seeking to establish *Res Judicata* by way of estoppel to prove all of the following:

(i) that the alleged judicial decision was what in law is deemed such;
(ii) that the particular judicial decision relied upon was pronounced, as alleged;
(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
(iv) that the judicial decision was final;
(v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
(vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceedings in which the estoppel was raised, or their privies, or that the decision was conclusive in *rem*.

In *Angle v. M.N.R.* (1974), 47 D.L.R. (3d) 544 (S.C.C.), Dickson J. enumerated three requirements of issue estoppel, relying on English authority:

> Lord Guest in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] 1 A.C. 853 at p. 935, defined the requirements of issue estoppel as:
>
> > "...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel was raised or their privies."

The Board cannot see, in this case, how a settlement or the approval of a settlement is the type of judicial decision that is a requirement of both tests set out above. There was no hearing on the subject-matter of the Complaints, nor was a final decision made on the merits of the TDL Complaints or the Complaints before the Board. It is only the Board that, in accordance with its obligations under section 39 of the *Code*, finally determines the merits of the subject-matter of a complaint.

The Board is also not satisfied that the same questions or issues were raised in the TDL Complaints and the Complaints before the Board. Although both heads of liability may arise from the same or similar fact patterns and may have the same "factual underpinnings", the subject-matter and legal theory of the TDL Complaints is an alleged breach of the *Code* arising from a failure of a franchisor to conduct an investigation or make inquiries regarding the alleged sexual harassment of employees of one of its franchisees. This is different from the subject-matter and legal theory of the Complaints which sets out behaviour and conduct related to specific allegations of acts or omissions in breach of the *Code* which involved Regenscheit, Kirkoryan and Adoptante, or others that took place between an employee and employer, an agent of an employer or a person in a position to confer, grant or deny a benefit or advancement to the employee. In addition, in the Kusi Complaint, there is also an allegation of discrimination on the basis of Creed.

Finally, the Respondents were not signatories on the TDL release. Without any evidence that it was intended that the Respondents be released, on the face of the TDL Complaints and the release of TDL signed by all the Complainants (with the exception of McWhirter), it is clear that the Respondents were not parties to the Complaints against TDL, nor were they to be relieved of liability when the release was signed.

As a result, the Board finds that the doctrine of *Res Judicata* is not applicable here.

Abuse of Process

In the exercise of its powers under section 23(1) of the *SPPA* the Board has the power to stay or dismiss a proceeding before it where to do otherwise would constitute an abuse of the Board's process. This involves considering what impact certain conduct has had upon the fairness of the hearing and whether it has impaired the ability of the person to defend a claim against them to such an extent that the integrity of or public respect for the decision maker would be undermined should the proceeding be allowed to continue (See *Anonuevo*, supra at paragraph 88).

While the decision of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission),* [2000] S.C.J. No. 43 (Q.L.) deals with the application of the principles of abuse of process at common law to administrative law proceedings in British Columbia and in the context of state rather than complainant delay, the reasoning in *Blencoe* mirrors the rationale of many cases applying section 23(1) of the *SPPA*. As a result the Board finds the tests and analysis set out in the *Blencoe* case to apply to proceedings before the Board.

Thus, to be successful on their abuse of process motion, absent proof of significant psychological harm or stigma, the Respondents must establish that their right to a fair hearing has been jeopardized by the delay in the filing of the Complaints or by the conduct of the Complainants and/or the Commission. The Respondents must provide proof of prejudice that is demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. (See *Blencoe*, supra at paragraph 104).

The authorities uniformly state that a stay for an abuse of process will be found only in the most exceptional circumstances and only in the clearest of cases. For there to be abuse of process the proceedings must be unfair to the point that they are contrary to the interests of Justice. There have been very few cases dismissed before the Board on this basis and then only in the most egregious and exceptional circumstances. (See *Blencoe, supra* at paragraphs 116, 118 and 120; and the authorities discussed in *Jeffrey v. Dofasco Inc.*, [2001] O.H.R.B.I.D. No. 8 at paragraph 12 and *Anonuevo, supra*

at paragraph 90)

Delay, without more, can be the foundation for an abuse of process claim, but those cases will be rare. Bastarache J., speaking for the majority of the Supreme Court of Canada, set out the proposition in this way at paragraph 115 of the judgment in *Blencoe*:

> I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute.

Finally, consideration must be given to whether a stay or dismissal is the most appropriate remedy for an abuse of process. It may be that any impairment to the fairness of the hearing can be remedied with a remedy that is less onerous than a stay or dismissal. In this way, a stay is recognized as not being the only way to remedy an abuse of process, but rather is *a remedy of last resort* and where a respondent asks for a stay he or she will have a heavy burden. (See *Blencoe,* supra at paragraph 117).

Abuse of Process as a Result of Delay in Filing the Complaints

The Parties' Submissions

Only the timeliness of the Deleon, Kusi, O'Brien, Ogalino and McWhirter Complaints is challenged. The delay in the Deleon Complaint is alleged to be eight months from the final incident

of alleged harassment by any of the Respondents. The Respondents allege that more than seven months elapsed prior to the filing of Ogalino's complaint.

The Respondents allege that the last incident of harassment as stated in the Kusi Complaint allegedly occurred in August 1996. The Complaint, however, alleges that conduct of reprisal occurred in October 1999. That Complaint was filed on January 30, 2000. With O'Brien, the Respondents allege a delay of more than four years between the last alleged incident of harassment and the filing of the Complaint. With McWhirter, the final alleged incident of harassment or reprisal allegedly occurred in 1997 and the Complaint was filed more than three years later.

The Respondents submit that this delay substantially prejudiced their ability to defend themselves against the allegations in those Complaints. To support this submission, the Respondents primarily relied on the statements made in the affidavit of Regenscheit and further submitted that the circumstances in this case were so similar to the circumstances of some of the Respondents' authorities that it inevitably leads to a conclusion of substantial prejudice in this case.

There were no affidavits filed by the Complainants or the Commission explaining the reasons for the delay in filing those Complaints. In fact, none of the parties undertook a detailed analysis of what caused the delay or if the Respondents contributed to the delay. The Commission asserts, however, that there was no cogent evidence led of proof of prejudice of sufficient magnitude to impact on the fairness of the hearing and the Respondents have not met the threshold in *Blencoe* or, for that matter, the threshold set in other Board decisions on abuse of process.

Proof of Prejudice of Sufficient Magnitude to Impact on the Fairness of the Hearing

Analysis

Absent evidence that the Respondents suffered significant psychological harm or that the filing of the Complaints attached a stigma to the Respondents' reputation such that to continue a

hearing would result in the human rights system being brought into disrepute, the Respondents can not rely on delay alone to support their motion.

According to *Blencoe*, and many decisions that preceded it, the Respondents must then satisfy the Board that they have been prejudiced by the delay. This is a heavy burden for which conjecture or anecdotal evidence will not suffice. At paragraph 102 of *Blencoe*, Bastarache J. explains:

> There is no doubt that the principles of natural justice and the duty of fairness is part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy. It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied. (References Omitted)

There was no *viva voce* evidence given by the Complainants, the Commission or the Respondents on the motion. The only evidence of prejudice is found in the affidavit of Regenscheit. As there was no cross-examination of Regenscheit on her affidavit, it stands unchallenged.

However, the Board is not satisfied that the unchallenged evidence establishes that the fairness of the hearing has been impaired or that the Respondents have provided proof of prejudice demonstrated to be of sufficient magnitude to impact on the fairness of the hearing.

The affidavit of Regenscheit states that the locating of witnesses will be exceedingly difficult, but does not state that the locating of witnesses is insurmountable. Furthermore, the Respondents only state that they have been unable to locate many individuals that Regenscheit "believes" will shed light on the events addressed in the Complaints. The Respondents do not indicate the source of Regenscheit's belief, the efforts made to locate them, who those witnesses are or even whether they are key or essential witnesses. Although the Respondents state at paragraphs 19 and 53 of their revised factum that unavailable witnesses "possess information directly relevant to the complaints at issue" and that "the Respondents have attempted to contact a number of individuals who have direct

knowledge of the allegations at issue" but have been unsuccessful, these statements did not find there way into Regenscheit's Affidavit. Nor did the Respondents provide any further details of the identity of these witnesses or what light they could shine on the allegations.

There is thus no evidence before the Board that an essential or key witness to the events at issue has died, is unavailable, or cannot be located with some additional effort. While substantial efforts to locate witnesses were undertaken by the respondents in the *Kodellas* case, there is no evidence before the Board of similar efforts being undertaken by the Respondents in this case.

The Respondents' also allege that they have also been prejudicially affected by the delay through the destruction of documents in the ordinary course of business, which they had no advance notice to preserve. However, the Respondents cannot rely on this bald assertion in the absence of specific details of the nature and importance of these documents.

The Respondents also relied on some of the factual circumstances and reasoning contained in *Kodellas v. Saskatchewan (Human Rights Commission)*, [1989] S.J. No. 306 (Q.L.) (Sask. C.A.), *NLK Consultants Inc. v. British Columbia (Human Rights Commission)*, [1999] B.C.J. No. 380 (Q.L.) (B.C.S.C.), *British Columbia Transit v British Columbia (Council of Human Rights),* [1991] B.C.J. No. 3089 (Q.L.) (B.C.C.A.) and *Crown Packaging Ltd. v. British Columbia (Human Rights Commission),* [2000] B.C.J. No. 2558 (Q.L.) (B.C.S.C.). Among those cases, the Respondents allege that because the incidents in *Kodellas* occurred in a restaurant setting, it should be more persuasive than other cases on the type of prejudice that can arise from delay.

The reasoning of the Supreme Court of Canada in *Blencoe,* overrules the finding at paragraph 40 of *NLK* that unreasonable delay per se will establish prejudice. The *British Columbia Transit* case is of little assistance because it does not consider the authorities on the issue of delay. In the *Crown Packaging* case, the hearing was scheduled some 83 months from the first allegation and it would appear that a key witness died. These factors are not present in the case before the Board. In *Kodellas,* after a consideration of all the facts, the Saskatchewan Court of Appeal found the

unreasonable delay to result in two forms of prejudice to Mr. Kodellas. First, it extended his psychological trauma. Second, it reduced Mr. Kodellas's chances of a fair hearing.

At paragraph 92 of *Blencoe*, the Supreme Court of Canada stated that the Court of Appeal in *Kodellas* erred in transplanting section 11(b) principles set out in the criminal law context to human rights proceedings under section 7 of the Charter. Because *Kodellas* is based on an incorrect test to remedy an abuse of process under section 7 of the *Charter*, which may have affected the Court of Appeal's finding of actual prejudice in that case, the case is of little use. In any event, the facts of this case are different from those before the Court of Appeal in *Kodellas*.

As a result, the Board does not find that these authorities relied on by the Respondents should be followed. Furthermore, the Board finds that the evidence led by the Respondents in support of the motion to dismiss or stay the proceeding because of some of the Complainants' delay in filing their Complaints is speculative and is not proof of prejudice of sufficient magnitude to impact on the fairness of the hearing.

Other Grounds Relied Upon by the Respondents for a Dismissal or Stay of Proceedings

Parties' Submissions

The Respondents further submit that it was improper for the Commission and the Complainants (except McWhirter) to settle the TDL Complaints, without first notifying the Respondents or involving them in the process. The Respondents reiterated that since the TDL Complaints and the Complaints before the Board arose from the same "factual underpinning" the complaints were improperly severed and dealt with separately by the Commission, when they should have been dealt with together.

The Respondents submit that the object, spirit and goal of subsection 32(3) of the *Code* is to avoid a multiplicity of proceedings, particularly where someone else's rights and interests are

affected. Relying on section 32(3) of the *Code* the Respondents submit that if the facts and issues are duplicated, the complaints should have been brought under one umbrella with one process.

The Respondents fell short of alleging a conspiracy, but submit that, except for McWhirter, the Complainants, who were represented at all times by counsel, and the Commission improperly concealed the existence and the details of the ultimate settlement of the TDL Complaints with all the Complainants (except McWhirter) from the Respondents.

The Respondents submit that any person who will be directly and substantially affected by a complaint should be given notice of the complaint and an opportunity to participate fully in the proceedings in defense of its interest. They argue that the rules of fairness require that anyone "affected" by the decision must be involved in the process. The Respondents submit that as such interested persons or parties, the Respondents should have received notification of the TDL Complaints and participated in the processing and resolution of those complaints. The Respondents argue that their exclusion from the process flagrantly and utterly ignored their rights.

Finally, the Respondents state that, in its entirety, the evidence before the Board of the conduct of the Complainants and the Commission including the allegation that the efforts of the Commission to attempt a resolution of the Complaints were "phony", indicates that the Commission and the Complainants were acting in bad faith and the Commission was biased. To allow the proceedings to continue would thereby result in an abuse of the Board's process.

The Respondents submit that the Board must dismiss the Complaints. They say that to do otherwise would be to sanction conduct in the Province of Ontario that would subvert the *Code* and offend, substantially and egregiously, the rules of procedural fairness.

The Commission submits that unless it is to remedy an abuse of the Board's process, the Board has no power to review the Commission's conduct leading up to referral or to say if the Commission failed to satisfy a statutory prerequisite or pre-condition, but that, in any event, all the

statutory requirements of the *Code* were satisfied.

The Commission admits that a duty of fairness was owed to the Respondents with respect to the processing of the Complaints before the Board, which the Commission says they satisfied. The Commission disputes the Respondents' characterisation of the facts of this case. The Commission submits that there was no evidence before the Board of bad faith or bias towards the Respondents.

The Duty of Fairness

It is trite law that there is a general duty of fairness resting on all public decision-makers (*Blencoe*, supra at paragraph 105). This duty of fairness is owed to those whose rights and whose interests may, or will, be affected by the decision. (See *Re Collins et al. v. Pension Commission of Ontario et al.,* [1986] O.J. No. 769 (Q.L.) (Ont. Div. Ct.) at pages 12 and 13)

In *Federation of Women Teachers' Associations of Ontario v. Ontario (Human Rights Commission),* [1988] O.J. No. 2068 (Q.L.), a case in which the conduct of the Commission was challenged, the Divisional Court, after reviewing the relevant case law, emphasized at page 10 of the decision that:

> These cases and others make it clear that the duty of fairness owed when dealing with an investigative body is to inform an interested party of the substance of the case against it and allow an opportunity for responding representations or submissions. There is no requirement to disclose the whole file, but a duty to provide a fair summary of the relevant evidence.

The Court of Appeal in *Payne v. Ontario Human Rights Commission*, [2000] O.J. No. 2987 (Q.L.), echoed this requirement at paragraph 156 of the decision, when it further explained the Commission's obligation in this way:

> In any event, procedural fairness dictates that the complainant and other parties who may be affected by a decision of the Commission be given notice of the facts,

> arguments and considerations upon which the decision is to be based and an opportunity to make submissions. Under the procedures adopted by the Commission, the complainant and others who may be affected by the decision are not entitled to attend the meeting at which the complaint is considered by the Commissioners. In advance of that meeting, they are given a copy of the Case Analysis Report that will be put before the Commissioners and are given an opportunity to make written submissions. If the Commission were to proceed on a different recommendation or to base its decision on factors or considerations undisclosed to the complainant and the others there would be no opportunity to respond and the right to fairness would be infringed.
>
> ...
>
> The procedures of the commission must be designed, and its practices conducted, in a manner commensurate with the nature and importance of the rights placed in its hands.

This repeats what is said in *Re Consumers' Distributing Co. Ltd. and Ontario Human Rights Commission et al,* [1987] O.J. No. 103 (Q.L.) (Div. Ct.) and *Re Collins, supra*. Namely, with its significant powers and responsibilities, the Commission has an obligation to ensure procedural fairness.

Bad Faith and Bias

The term "bad faith" normally connotes moral blameworthiness on the part of the person accused, encompassing conduct designed to mislead or pursued for improper motive. (See *Pritchard*, supra, at page 6). The test for bias contains a two-pronged objective standard: the person considering the issue of alleged bias must be reasonable and informed; and the apprehension of bias must itself be reasonable. (See *R. v. S.(R.D.),* (1997) 151 D.L.R. (4^{th}) 193 (S.C.C.) at pages 207 and 229 to 231.)

Analysis

The hearing before the Board is a hearing de novo, and unless it results in an abuse of the Board's process, even a flawed or biased investigation will not deprive the Board of the ability to conduct a hearing under section 39 of the *Code*. (See *Ford Motor Co. of Canada v. Ontario (Human Rights Comm.) supra,* at page D/465). Similarly, as set out above, unless there is an abuse of the Board's process, the remedy for the conduct of the Commission leading up to referral, including how the Commission processes the complaint or complaints, lies with the Divisional Court.

Therefore, in order to find an abuse of process in this case the Respondents must establish proof of prejudice. The Respondents have not satisfied this onus.

The Respondents have failed to lead sufficient evidence of prejudice arising from an alleged failure to attempt a settlement of the Complaints or the settlement of the TDL Complaints. The Board offers mediation services after a matter has been referred. Any prejudice arising from the failure of the Commission to mediate can be thereby cured. Furthermore, there was no relief requested against the Respondents in the TDL Complaints, nor were those complaints ultimately referred to a hearing where an evidentiary determination may have been made that could have adversely affected the Respondents or their defense to the Complaints. The Respondents did not explain how their participation in the TDL Complaints has affected the hearing of these Complaints, or how the conduct of the Complainants or the Commission in the circumstances surrounding the settlement or the actual settlement of the TDL Complaints adversely affected their ability to defend against these Complaints. As a result, the Respondents have failed to establish that the conduct complained of resulted in actual prejudice or impacted on the fairness of this hearing.

Although not necessary for the disposition of this motion, the Board is also not satisfied that the evidence on the record before it supports the contention that the complaints were improperly severed. TDL was not named as a party in the complaint that Neves ultimately served and the TDL Complaints and these Complaints were brought separately. While Ms Rubin did state in her

examination that the TDL Complaints and these Complaints have the same factual underpinning, as set out above, the subject-matter of the complaints, the basis upon which liability for breach of the *Code* is based and the parties are different.

The presence of the word "may" in section 32(3) of the *Code* indicates that in its discretion, where two or more complaints bring into question a practice or infringement engaged in by the same person or have questions of law of fact in common, the Commission may combine complaints and deal with them in the same proceeding before the Board. While there is no provision in the *Code* that allows complaints to be severed, there is also no provision in the *Code* that prohibits two complaints being dealt with separately. Nor is there a statutory provision that stops complainants from settling a complaint against one respondent and continuing against another. Therefore, even if the subject-matter of these Complaints and the TDL Complaints was the same, which is not the case, separate complaints may still have been made or continued against the different parties.

The Board must state that it did not find the Record of Contact dated November 30, 1999, to be of great assistance in determining this matter. While the Board can admit hearsay evidence, this Record of Contact is a synopsis of a telephone conversation between Neves and a Commission employee, neither of whom were called to give evidence on the content of their telephone conversation. In any event, there was no evidence that the complaint that was the subject of the telephone conversation was ever served.

Finally, although the Respondents criticised the lack of a specific response to allegations of bad faith and bias in the materials filed by the Commission in response to the motion, and asked that an adverse inference be drawn from the lack of response, it is the Respondents who ultimately bear the burden of proving bad faith and/or bias. Based on the evidence before the Board, the Respondents have failed to do so. Allegations of wrongdoing and conspiracy sufficient to support a finding of bad faith or bias must be supported by cogent evidence. There was simply not sufficient evidence before the Board to conclude that the Complainants or the Commission engaged in conduct during the investigation or leading up to referral, that was tainted by bias or "designed to mislead or

pursued for improper motive" such that it jeopardized the Respondents' right to a fair hearing or was of sufficient magnitude to impact on the fairness of the hearing, or that caused the Respondents actual significant or substantial prejudice so that continuing this proceeding would be an abuse of process.

The Discrete or Cumulative Effect of Prejudice

The Board has carefully considered the Respondents' submissions and evidence in support of the request for a stay or dismissal and has considered the actions of the Commission and the Complainants both discretely and cumulatively. The prejudice alleged by the Respondents is at best speculative. The Board has carefully considered and balanced the competing rights and interests of the parties and the administration of justice. The Board finds that the conduct and actions of the Commission and the Complainants did not result in actual significant or substantial prejudice to the Respondents, did not affect the fairness of the hearing nor impaired the ability of the Respondents to defend the claim against them such that permitting the hearing to continue would be an abuse of process. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. The Board does not find that the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of legislation if the proceeding were halted, or that the proceedings are so unfair or oppressive as to be contrary to the interests of justice. As a result, the Respondents' motion for a stay or dismissal of the proceeding is denied.

The effects, if any, of the passage of time can be dealt with in submissions on the weight to be placed on evidence. If during the hearing, sufficient facts are led to support a motion for an abuse of process, the Respondents may renew their motion.

Removal of Certain Corporate Respondents

Parties' Submissions

The Respondents request the removal of some of the corporate parties currently named as Respondents. At the hearing the Respondents asked that the following four Corporate Respondents be removed: 1060283 Ontario Limited, 1060284 Ontario Limited, 870359 Ontario Limited and 1119624 Ontario Limited. The affidavit of Regenscheit reveals that the Complainant Kusi was employed at the Sherway Gardens Store (1060284 Ontario Limited). Accordingly, the Board will only consider the arguments as they relate to 1060283 Ontario Limited, 870359 Ontario Limited and 1119624 Ontario Limited (the "Three Corporate Respondents").

The Respondents submit that the Corporate Respondents named in the Complaints were created to own a specific franchise in a specific location, with separate payroll, expenses and profit. At paragraph 4 of the Respondents' revised factum it is stated that each of the Corporate Respondents operates a separate Tim Horton's restaurant in accordance with license agreements with TDL, the licensee for Tim Horton's. Although Kirkoryan and Regenscheit are officers, directors and shareholders of all the Corporate Respondents, and Adoptante is an employee of the Corporate Respondents, the Respondents submit that the Three Corporate Respondents should be removed because no employment relationship is alleged between the Complainants and the Three Corporate Respondents.

The Commission does not consent to the removal of the Three Corporate Respondents. The Commission submits that the Respondents have not provided sufficient evidence to support a lack of relatedness between the Three Corporate Respondents and the Complainants and there is no prejudice to maintain these Three Corporate Respondents as parties to the Complaints since they are simply corporate bodies owned by Regenscheit and Kirkoryan. This is not a situation where other human persons are being required to attend these hearings or go to the expense of securing additional legal counsel.

Analysis

The Respondents have not led sufficient evidence to satisfy the Board, on a balance of probabilities, that there is not a corporate relationship between all the Corporate Respondents either by way of shared shareholdings, shared employment, an agreement to share liability or shared licensing agreements, which relationship may impact on the Complainants. Furthermore, Adoptante is admitted to be an employee of all the Corporate Respondents, for whose conduct they may ultimately be responsible.

Under section 39(2) of the *Code*, the parties to a proceeding before the Board include any person who the Commission alleged has infringed the right. All the Corporate Respondents were named in the referral to the Board. In the exercise of its powers under section 41(1) of the *Code* a Board may by order direct an infringing party to do anything that, in the opinion of the Board, the party ought to do to achieve compliance with the *Code*, both in respect of the complaint and in respect of future practices. It may be that, if a breach of the *Code* by the Corporate Respondents is established the Board may order that all the Corporate Respondents adopt measures to avoid a repetition in the future.

Although there is no specific provision in the *Code* allowing for the removal of respondents in cases before the Board, in reliance on the power to control its processes, in cases where there is an assumption of liability by a remaining party and on consent, respondents have been removed. In this case there is no suggestion that the other Corporate Respondents will assume the liability, if any, of the Three Corporate Respondents sought to be removed nor has the Commission consented to the removal of the Three Corporate Respondents.

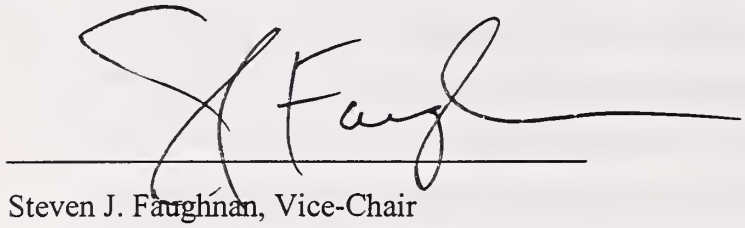
It would be prejudicial to the Complainants if the Board released a party at a preliminary motion and then a full hearing disclosed that the party would have been liable for damages or subject to an order under section 41(1) of the *Code*.

For these reasons, the Respondents' motion to remove the Three Corporate Respondents is denied.

ORDER

The motion is dismissed. The Deputy Registrar shall contact the parties to arrange a Pre-Hearing Conference call to set hearing dates and deal with any pre-hearing matters.

Dated at Toronto, this 7th day of November, 2001



Steven J. Faughnan, Vice-Chair